United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/C

WESTERN UNION INTERNATIONAL, INC., Petitioner,	)	
v.	)	No. 75-4132
FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, Respondents,	)	
ITT WORLD COMMUNICATIONS, INC., STATE OF HAWAII, WESTERN UNION TELEGRAPH COMPANY, Intervenors.	)	

PETITION OF THE FEDERAL COMMUNICATIONS COMMISSION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

Respondent Federal Communications Commission hereby petitions for rehearing pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure.1/ En banc rehearing is respectfully suggested because the majority opinion is in conflict with judicial precedent, and overturns an administrative decision on the basis that the agency lacks authority, where there is no "compelling evidence that such was Congress' intention." Permian Basin Area Rate Cases, 390 U.S. 747, 780 (1967); United States v. Southwestern Cable Co., 392 U.S. 157, 177 (1960).

Basically, the order under review was a decision by the Commission that the Western Union Telegraph Co. (WU) is

1/ Hereinafter, citations to the above-captioned case will be to the slip opinion (Slip Op.), decided October 20, 1976.

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eligible to apply for authority to lease and operate facilities between the continental United States and the State of Hawaii for the purpose of extending WU's recently developed Mailgram service 2/ to Hawaii. The majority of the panel assigned to hear the case held that §222(c)(2) of the Communications Act, 47 U.S.C. 222(c)(2) prohibited the Commission from considering such an application.

Congress added Section 222 to the Communications Act in 1943 to permit Western Union to merge with the failing Postal Telegraph Cable Co. In order to insure that the merged WU Company would not be able to use its newly found domestic public message telegraph monopoly to favor its own international message operations, Congress imposed certain safeguards. Among these was §222(c)(2) which provides in pertinent part:

> (2) Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission . . . . (Emphasis added).

The Court summarized its holding as follows:

> In short, §222(c)(2)'s directive as to the divestment by the merged domestic carrier (WU) of "international telegraph operations theretofore carried on by any party to the consolidation or merger" was meant as a continuing bar to WU's involvement in international record communications which would include mailgrams. This was the price paid by the company for the acquisition of a domestic monopoly over telegraph service.

Slip Op., at 171 (Emphasis added).

2/ "Mailgram" is a service whereby subscribers' messages are computer-routed by WU, over circuits specifically dedicated to Mailgram service, to pre-selected Post Office locations throughout the country. Postal employees take the messages off teleprinters and mail them to the addressees so that they are usually received by the next working day.

We respectfully submit that the majority has reached a conclusion which distorts the common and legal definitions of the word "divestment," is contrary to the clear import of the statute, and is not supported by the legislative history.

The term "divestment" has a clear and unambiguous meaning. It is defined as "the compulsory transfer of title or disposal of interests (as stock in a corporation) upon government order." Webster's Third New International Dictionary (1971).

The Courts deal most frequently with divestment orders in the context of framing antitrust decrees. It is generally accepted that such decrees are "two-fold in character" Standard Oil Co. v. U.S., 221 U.S. 1, 78 (1910):

> 1st. To forbid the doing in the future of acts like those...found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute....

Ibid. (Emphasis added).

Once the Court has decided to order divestment it must turn to the question of how to insure that the affected party will not recreate directly or indirectly the illegal combination which the decree dissolved. After divestment, unless the affected party is forbidden to do so by specific injunctive language, it may renegotiate agree-

ments, contracts, and even combinations dissolved by the courts.3/ Of course, this subsequent conduct would be subject to antitrust scrutiny, just as the earlier conduct had been.

One recent example of this occurred in Ford Motor Co. v. U.S., 405 U.S. 562 (1972). There the Supreme Court affirmed a District Court decision which found that the Ford Motor Co. had violated the Celler-Kefauver Anti-merger Act by acquiring certain assets from Electric Autolite Co.--in particular, Autolite's trade name and its facilities for manufacturing spark plugs. The District Court ordered Ford to divest these assets in order to re-establish competition in the spark plug market. It also prohibited Ford from using its trade name on spark plugs for five years, and enjoined it from manufacturing spark plugs for 10 years. After expiration of these time limitations Ford will be able lawfully to reestablish itself in the spark plug market. Id., at 557. Indeed, without these terms, referred to by Chief Justice Burger as "ancillary injunctive provisions," Ford would have been able to grow back into the market immediately. Id., at 582, 592 (concurring opinion).

3/ Standard Oil, supra at 80-81. See also the cases cited by Judge Mansfield, Slip Op. at 176 regarding the ability of a divested company to grow back into a market.

Similarly, in this case, Congress ordered a divestment of international telegraph operations "theretofore carried on." The ancillary injunctive provisions of Section 222 are contained in Section 222(b)(1):

> Provided, That, except as provided in paragraph (2) of this subsection, no domestic telegraph carrier shall effect a consolidation or merger with any international telegraph carrier, and no international telegraph carrier shall effect a consolidation or merger with any domestic telegraph carrier.

As can be seen, that section contains nothing to suggest that WU cannot, upon grant of FCC authority, grow back into the international telegraph market through development of new services, just as Ford may grow back into the spark plug market. As Judge Mansfield pointed out in his dissenting opinion, if Congress had wished to erect a continuing bar it could easily have done so. "All it had to do was to provide that following divestiture the merged enterprise should not engage in international operations or that it should be restricted to domestic service." Slip Op. at 172. Its silence on this point can not contort a plain order to divest into what amounts to a permanent injunction against growing back into the market.

Generally, Courts delve into the legislative history of a statute only when the intent of the statute is unclear or ambiguous on its face. AT&T v. FCC, 503 F.2d 612, 616 (2d Cir. 1973). This is because, as Judge Mansfield noted, "[n]ormally where the plain meaning of a statute is clear legislative history, even if indicating a different intent, will not justify a departure from that meaning. See Caminetti

v. United States, 242 U.S. 470, 485 (1917)." Slip Op. at p. 174 (dissenting opinion).

Here, however, the majority ignored the clear, unambiguous meaning of the statute itself, and turned directly to the legislative history. There it seized upon statements made to Congress by then Chairman Fly and FCC Commissioner Durr, and an unenacted proposal considered by a Senate committee, to conclude that Congress intended more than is apparent on the face of the statute: "more than simply barring domestic carriers from engaging in the particular international operations and services that were being provided in 1943." Slip Op. at p. 170.

Even taken in combination, these aspects of the legislative history are insufficient to support the conclusion reached by the majority. The legislative history of §222, as Judge Mansfield noted, "far from lending support to the majority's position, tends to point in the opposite direction." Slip Op. at pp. 174-175. The statements by the two FCC Commissioners are not statements of Congressional committees or members - "They hardly reflect the views of the Senate and House Committees reporting on the proposed legislation, much less those of Congress." Slip Op. at p. 175 (dissenting opinion). Nowhere in the Committee reports is there any recommendation that the merged enterprise be thereafter forever barred from international telegraph message operations.

Even the preliminary Committee proposal relied upon by the majority 4/ would only have "empower[ed] the Commission to restrict the merged company to domestic operations "if found to be in the public interest."5/ A suggestion that an agency be given power to restrict a company's area of operations is a far cry from a proposal that the agency be prohibited from authorizing operations in that area. Nor can it be construed as an indication that the order to divest subsequently adopted was actually intended to include a permanent injunction.

Every successive draft of §222 as it progressed in Congress contained the language "theretofore carried on." This, coupled with the undisputed fact that the dominant purpose underlying enactment of the divestment clause was the fear that WU would be able to use its monopoly position unfairly to favor its own established international message operations, points to the conclusion that Congress had no intention to go beyond the clear meaning of the statutory language.

4/ See Slip Op. at 165:

> "(d) The legislation should define 'domestic' and 'international' carriers and shall not prevent the inclusion of all existing operations of any domestic carrier, which may be engaged partially in international telegraph communications, into the merged domestic enterprise, and shall empower the Federal Communications Commission eventually to require the merged domestic carrier to restrict itself solely to domestic telegraph operations if found to be in the public interest."

S. Rep. No. 769 (Study of the Telegraph Industry), 77 Cong. Rec. 25, 1st Sess. (1941).

5/ Ibid.

The majority, erroneously we believe, refused to accord the usual weight to the agency's interpretation of its own statute, see Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969), because it construed two previous orders of the Commission to be inconsistent, and decided that this detracted from the validity of the decision under review. Both of those orders, Telegraph Service with Hawaii, 28 FCC 599, aff'd on reconsideration, 29 FCC 714 (1960), and Western Union Divestment, 30 FCC 323 (1961), came at a time when the Commission was working to achieve the divestiture ordered by Congress (the actual divestiture did not take place until 1963). The Commission was not there directly confronted with the necessity of determining whether the merged company could extend new services to international points after divestiture. Neither of these decisions should detract from the validity of the Commission's interpretation in the order under review.

The majority's holding could stand only if §222 is read as an attempt by Congress to divide the international message telegraph industry permanently into separate domestic and international spheres. However, as the Commission noted in the order under review (A. 57-8),

> [h]ad Congress intended to divide the telegraph industry into domestic and international spheres, it would have done so by a provision more tailored to achieve that goal than the divestment clause.

The provision simply does not state such an intention; Section 222(c)(2) merely provides that WU must divest the international operations it had previously carried on.

While the legislative history indicates that Congress originally did intend to make such a division, see, e.g., S. Rep. No. 769, supra, at 3-9, it is clear that Congress never enacted the legislation necessary to accomplish that goal. The text of the present Section 222 evolved over the course of several years, and in differing forms, in a number of House and Senate bills. As originally proposed, the legislation would have permitted both domestic and international mergers, authorized the domestic entity to acquire the domestic operations of international carriers, 6/ and the international entity to acquire the international operations of the domestic carriers, and authorized WU to acquire the domestic telegraph operations of AT&T. See S. Rep. No. 749, supra. Subsequently, World War II intervened, and the

6/ In 1943, several IRCs were authorized domestic PMS operations which had been suspended for the duration of World War II by the War Communications Board for reasons of internal security and the need to use the radio frequencies used in those operations. The Western Union Telegraph Co. 55 FCC 2d 668, 679 (1975) (Appendix A41). The validity of the underlying authorizations, however, was not affected by that action and the fact that none of those IRCs chose to revive those operations after the war has no bearing on the situation facing Congress in enacting Section 222.

provisions relating to merger of the IRCs and the divestment of their domestic operations were removed. All that remained was the divestment clause in Section 222(c)(2). This provision alone is not sufficient to accomplish the total separation of the domestic and international markets which is implicit in the majority holding.

Since the language of Section 222(c)(2) by its terms applies only to WU, even under the majority's interpretation it would not preclude creation of a new domestic telegraph carrier, or the authorization of such an entity to compete with the IRCs internationally. Further, Section 222 is silent with respect to authorizing one or more of the IRCs to operate in the domestic sphere in competion with WU.7/ The failure of Congress to provide for these obvious eventualities militates strongly against an interpretation of Section 222 as an attempt to divide the telegraph market. Each of these eventualities is within the Commission's power to authorize under 47 U.S.C. 214 if it is determined that it will benefit the public interest.

Section 222 did nothing to erode the Commission's authority under Section 214 to authorize services and structure the industry in the manner most beneficial to the public interest. There is simply nothing in the Act, or its legisla-

7/ The Commission has recently opened to all IRCs the existing gateways out of which international carriers may pick up and receive messages, International Record Carriers' Scope of Operations In The Continental United States, 58 FCC 2d 250 (1976), and presently has under consideration proposals to further expand the number of gateway cities, Further Notice of Inquiry and Proposed Rule Making, Docket 19660, 54 FCC 2d 532 (1975).

tive history which can reasonably be interpretated as an intention by Congress to strip the Commission of this authority. Without an explicit statement of intent so to limit the Commission's statutory authority, the Court must affirm the order under review. Any other conclusion conflicts with the pattern and scheme of the Communications Act, which as noted by Judge Mansfield -

> is to set forth legislative objectives and give broad authority to the FCC, as the depository of expertise in the complex business of communications, to implement those principles and achieve the objectives in light of changing technology and market developments. See United States v. Southwestern Cable, 392 U.S. 157, 172-73 (1968).8/

For the reasons stated above, the Federal Communications Commission respectfully requests that the case be reheard en banc.

Respectfully submitted,

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8/ Slip Op. at p. 177-78 (dissenting opinion). The majority holding cannot be confined merely to Mailgram service, but will apply to any new technological developments which WU might be able to offer in international record services. As such it may impact adversely upon the Commission's duty "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and World-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. 151.